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20 ***Injury/Wrongful Death Cases***

21 **UNITED STATES DISTRICT COURT**
22 **CENTRAL DISTRICT OF CALIFORNIA**

23 IN RE: TOYOTA MOTOR CORP.
UNINTENDED ACCELERATION
24 MARKETING, SALES PRACTICES, AND
PRODUCTS LIABILITY LITIGATION

25 This documents relates to:

26 ALL CASES
27
28

Case No.: 8:10ML2151 JVS (FMOx)

**DEFENDANTS' PROPOSED
DISCOVERY PLAN**

Date: June 23, 2010
Time: 9:00 a.m.
Location: Court Room 10C
Judicial Officer: Hon. James V. Selna

1 **I. PRELIMINARY NATURE OF THIS DISCOVERY PLAN**

2 Federal Rule of Civil Procedure 26(b)(1) permits discovery of matters, not
3 privileged, "relevant to the claim or defense of any party." For this reason, a
4 discovery plan should be based on the "identif[ication of] the primary issues, at least
5 preliminarily, based on the pleadings and the parties positions at the initial
6 conference." *Manual for Complex Litigation* § 11.31 (4th ed. 2004) (hereinafter
7 "MCL"). In the present case, however, although certain individual personal
8 injury/wrongful death cases have been filed and may be subject to case-specific
9 discovery, the Plaintiffs have not yet filed their Consolidated Class Action Complaint
10 or identified their class claims, the class definition(s), or the theory or theories of
11 defect.¹ In addition, certain individual lawsuits and the Consolidated Class Action
12 Complaint may be subject, in whole or in part, to Rule 12 Motions, that may further
13 refine and narrow the claims at issue in this litigation. Accordingly, this Discovery
14 Plan is preliminary and will be subject to further amendment and revision, as the
15 factual and legal issues in dispute are more clearly identified and defined by the Court
16 and the Parties.

17 **II. SEQUENCING OF DISCOVERY**

18 Defining the scope of the issues in the MDL and prioritizing those issues in this
19 MDL to correspond to the specific stages of the litigation are necessary to establish
20 the appropriate sequence and limits for discovery and to effectively manage the
21 discovery in the MDL. MCL at § 11.422 ("Discovery control in complex litigation
22 may take a variety of forms, including time limits, restrictions on scope and quantity,
23 and sequencing."). Discovery should be sequenced in light of the material issues in
24 controversy, including but not limited to phasing and focusing discovery on causation,
25 injury, damages, class certification (where appropriate) and technical issues. While it
26

27 ¹ The Parties have informed the Court that the Plaintiffs have not yet determined
28 whether they intend to pursue claims on behalf of a "recall class," i.e., on behalf of
consumers who purchased vehicles recalled by Toyota, or whether the consolidated
complaint will only proceed on the basis of an alleged defect in ETCS.

1 is anticipated that there will be some overlap between the individual personal
2 injury/wrongful death lawsuits and the Consolidated Class Action Complaint, this
3 Court recognizes that different tracks for the discovery may be necessary depending
4 upon the theories of liability and defect alleged in the lawsuits, issues specific to the
5 individual plaintiffs and class representatives, and the requirements of Federal Rule of
6 Civil Procedure 23. Staging and sequencing discovery will assist the parties in
7 preventing “unreasonably cumulative or duplicative” discovery and discovery for
8 which “the burden or expense . . . outweighs its likely benefit” under Rule 26(b)(2).

9 It is the intent of the Court that discovery is sequenced to avoid as much as
10 possible wasting time and resources on discovery that could ultimately be unnecessary
11 based on the claims ultimately asserted by Plaintiffs in the Consolidated Class Action
12 Complaint and the outcome of motions to dismiss, *Daubert* motions, and class
13 certification motions. Moreover, the discovery plan should correspond to the Court’s
14 anticipated orders on overall case scheduling, which will include dates for the
15 technical tutorial, deadlines for identification of experts and completion of expert
16 reports, and deadlines for filing motions for summary judgment, motions for class
17 certification, and *Daubert* motions. To accomplish this goal while simultaneously
18 moving forward with discovery that advances this litigation, the Parties shall prioritize
19 certain areas of discovery as set forth in the discovery plan below.

20 Phase I priorities to be focused upon, though not required to be completed, in
21 the next 90-150 days: (1) completion of initial disclosures by Plaintiffs, (2) production
22 of documents that Toyota previously produced to NHTSA, the United States
23 Congress, and State Attorneys General as required pursuant to Order No. 3, (3)
24 preliminary 30(b)(6) Depositions focused on threshold issues identified in Part III,
25 *infra*, (4) Case-Specific Discovery in Personal Injury/Wrongful Death Cases, (5)
26 commencement of targeted class certification discovery, and (6) commencement of
27 targeted ETCS merits discovery. Commencement of any discovery shall be subject to
28 and consistent with the specific dates identified in this Order, *infra*, any subsequent

1 order on discovery scheduling, or by agreement of the Parties. The end of Phase I
2 roughly corresponds to the date on which the briefing and oral argument on Rule 12
3 motions will be completed, and rulings on those motions may further define the issues
4 in the MDL.

5 Phase II priorities to be focused upon, though not required to be completed, in
6 the 90-120 days following the end of Phase I: (1) continuation of Case-Specific
7 Discovery in Personal Injury/Wrongful Death Cases, (2) continuation of class
8 certification discovery, and (3) continuation of targeted ETCS discovery.
9 Commencement of any discovery shall be subject to and consistent with the specific
10 dates identified in this Order, *infra*, any subsequent order on discovery scheduling, or
11 by agreement of the Parties.

12 At this stage in the litigation, this Court will not identify further phases, but
13 reserves the right to do so in future orders.

14 The Court and the Parties anticipate that this discovery plan will be revisited
15 and revised throughout this litigation as claims, issues, and defenses are narrowed and
16 refined, and that additional areas of discovery will be addressed in subsequent
17 discovery plans.

18 **III. PRELIMINARY 30(B)(6) DEPOSITIONS**

19 The Court understands that lead Counsel for the Plaintiffs initially proposed a
20 detailed list of the topics they wish to cover through depositions pursuant to Fed. R.
21 Civ. Pro. 30(b)(6) during Phase I of discovery. Although Defendants objected to
22 certain categories as too broad, undefined, and unfocused, Defendants were in
23 agreement that limited Rule 30(b)(6) depositions would assist the parties and the
24 Court in identifying the proper parties to this litigation and developing a more
25 narrowly tailored discovery plan.

26 After meeting and conferring, the Parties have reached general agreement about
27 the topics that should be covered in these preliminary Rule 30(b)(6) depositions, and
28 the Toyota Defendants have agreed to produce a witness (or witnesses) for deposition

1 pursuant to Fed. R. Civ. Pro. 30(b)(6), on topics limited to threshold issues, such as:

- 2 • The Toyota defendants' organizational structure;
- 3 • The roles and responsibilities of the various Toyota companies with
- 4 respect to the design, manufacture and sale of Toyota vehicles;
- 5 • The relationships among various Toyota entities, between Toyota entities
- 6 and Toyota and Lexus dealers, and between Toyota entities and its
- 7 suppliers;
- 8 • The nature, location and retention of documents related to ETCS design,
- 9 evaluation, and testing of the ETC system and components, including
- 10 specifically drawings, specifications, testing standards, test reports, and
- 11 Failure Mode and Effects Analysis ("FMEA") (including Fault Tree
- 12 Analysis ("FTA") and Design Review Based on Failure Mode
- 13 ("DRBFM");
- 14 • The nature, location and retention of documents related to the
- 15 manufacture of the ETC system and components, including specifically
- 16 quality control documents;
- 17 • Persons and departments involved in the design, evaluation, testing and
- 18 manufacture of the ETCS and its components;
- 19 • The nature, location and retention of documents related to information
- 20 Toyota receives about speed control, surge, and UA events in Toyota and
- 21 Lexus vehicles, including specifically warranty records, customer
- 22 complaints, claims and lawsuits ("Field Performance Documents");
- 23 • Persons and departments involved in the intake and evaluation of Field
- 24 Performance Documents;
- 25 • The nature, location, and retention of documents related to electronic data
- 26 recorders, electronic data readers, and stored electronic data (collectively
- 27 "EDRs");
- 28

- 1 • Persons and departments knowledgeable about EDRs and stored data in
- 2 Toyota and Lexus vehicles; and
- 3 • The nature, location, and retention of sales and marketing documents.

4 The Court agrees that the limited 30(b)(6) deposition(s) will assist the parties
5 and the Court in identifying proper parties to the litigation and in developing a more
6 narrowly tailored discovery plan. Accordingly, during Phase I of discovery, the
7 Toyota Defendants shall produce a witness (or witnesses) for deposition pursuant to
8 Fed. R. Civ. Pro. 30(b)(6) to address threshold topics as agreed to by the Parties. The
9 Parties are directed to meet and confer regarding threshold topics in addition to those
10 identified above which may be covered in the limited 30(b)(6) deposition(s), including
11 but not limited to the additional twelve (12) topics identified by Plaintiffs on June 21,
12 2010, and to attempt to reach agreement. If no agreement can be reached, the Parties
13 may seek intervention from the Court. This limited 30(b)(6) deposition(s) is not
14 intended to be an exploration of the merits of the Plaintiffs' claims at this early stage
15 of the litigation, and it shall not involve asking the deponent to comment on the
16 substance or merits of any claims asserted in the MDL or any documents already
17 produced to Plaintiffs, except as such documents relate to defining roles and
18 responsibilities among or within the Toyota defendants.

19 Lead Plaintiffs' counsel shall provide a 30(b)(6) deposition notice consistent
20 with this Order to the Toyota Defendants. The Toyota Defendants shall provide
21 objections to that notice consistent with the Federal Rules of Civil Procedure and local
22 rules of district, and the process and procedure for resolving such discovery disputes
23 shall follow those same rules. No 30(b)(6) deposition notice under this provision shall
24 require deponents to produce documents or other tangible evidence. However,
25 nothing herein shall prohibit deponents from bringing exemplar documents to their
26 depositions if they so choose.

27 To the extent that the deposition rules and procedures contained *infra* in Section
28 VIII. C. do not conflict with the procedures outlined in this Section, these limited

30(b)(6) deposition(s) shall be noticed and conducted pursuant to the procedures set forth in Section VIII. C.

Because this preliminary Rule 30(b)(6) deposition is intended to educate the Plaintiffs so that discovery requests can be more narrowly tailored, except as expressly provided *infra*, Plaintiffs shall not propound written discovery on Defendants until this limited Rule 30(b)(6) deposition(s) has been completed. At the conclusion of these 30(b)(6) depositions, the Parties are directed to meet and confer and submit a more tailored discovery plan to the Court based upon the information learned in the depositions.

IV. CASE-SPECIFIC DISCOVERY IN PERSONAL INJURY AND WRONGFUL DEATH CASES

The parties are directed to commence (or continue) with case-specific discovery in personal injury/wrongful death cases as outlined below. Case-specific discovery shall include discovery related to eye witnesses, medical witnesses, individual plaintiffs, the vehicles involved in any alleged unintended acceleration incidents, and any other discovery that would not be duplicative of discovery in any other case, including other Personal Injury/Wrongful Death Cases or the Class Actions. Except as explicitly provided, Section III of this Discovery Plan shall not apply to the economic loss class actions.

A. Vehicle Preservation And Inspection²

1. Accident Vehicles in Plaintiff's Possession, Custody or Control

Plaintiff shall preserve the vehicle in its post-incident condition. Within thirty (30) days of service of the Complaint and Summons on Toyota in an individual case, plaintiff shall advise Toyota of the whereabouts of the vehicle, if known.

Plaintiff shall make the vehicle available for a reasonable number of non-destructive inspections upon request, with reasonable notice, not less than twenty (20)

² Vehicle Preservation and Inspection Issues relevant to the class actions are discussed *infra* at Section V.C.2.a.

1 days. The parties understand that a specific protocol will be agreed upon in advance
2 and will take into consideration the nature of the claims as well as the condition and
3 availability of the vehicle. Depending on the circumstances, Toyota's initial
4 inspection will include:

- 5 1) Inspect/photograph the interior and exterior of the vehicle;
- 6 2) Inspect/photograph the engine compartment and undercarriage;
- 7 3) Measure oil, brake fluid, and transmission fluid levels;
- 8 4) Inspect/photograph the accelerator and brake pedals, measure
9 positioning of pedals, measure pedal travel;
- 10 5) Connect the Techstream tool and measure accelerator and throttle
11 sensor voltage;
- 12 6) Connect the event data recorder ("EDR") read out tool to the
13 supplemental restraint system airbag electronic control unit and "read out" the
14 available EDR data.
- 15 7) Remove accelerator pedal and inspect/photograph it, then replace it
16 with a new pedal if appropriate (e.g. recall service not yet performed);
- 17 8) Inspect/photograph both sides of the floor mats; and
- 18 9) If the vehicle is operational, test drive the vehicle on city streets
19 and on the highway, with multiple applications of the brake and accelerator
20 pedals; confirm operation of air conditioner, power steering, and cruise control.

21
22 Toyota shall provide Plaintiff with an electronic copy of the data retrieved with the
23 Techstream tool as well as the raw hexadecimal readout data and print out from the
24 read out retrieved from the supplemental restraint system electronic control unit
25 EDR." Toyota shall not be precluded from further reasonable inspection(s) of the
26 subject vehicle; subsequent inspections (e.g., by an accident reconstruction expert)
27 need not follow the protocol provided above but the general scope of said inspection
28 must be agreed to in advance. The parties shall be permitted to make modifications to

1 the protocol or procedure of the inspection, however, the protocol provided above will
2 be permitted and followed, at a minimum.

3 No party may inspect the subject vehicle without providing reasonable advance
4 notice to the other party(s), not less than twenty (20) days. Each party is entitled to
5 attend and document the other's inspections. Such notice must also explicitly state
6 whether the inspection will involve any destructive inspection to testing or retrieval of
7 any electronic data from the on-board computer modules.

8 If a party objects to a proposed inspection, or the scope/protocol of the
9 inspection, the party must give notice of the intent to file a motion for protective order
10 at least five (5) days before the date noticed for the inspection, outlining the objections
11 and basis for the motion, and must file the motion within seven (7) days thereafter.
12 Upon receipt of such notice, the proposed inspection shall be stayed pending the
13 court's ruling on the objecting party's motion for protective order.

14 **2. Accident Vehicles Not in Plaintiff's Possession, Custody or**
15 **Control**

16 To the extent possible, plaintiffs must make all reasonable efforts to preserve
17 vehicles in their post-incident condition, including sending correspondence to the
18 vehicle owner, if known, requesting that the vehicle be preserved and not destroyed or
19 salvaged.

20 Within thirty (30) days of service of the Complaint and Summons on Toyota in
21 an individual case, plaintiff must advise Toyota of the whereabouts of the vehicle, the
22 vehicle owner, and the date on which the vehicle left plaintiff's possession, custody or
23 control, if applicable and if known.

24 To the extent possible, plaintiff is to cooperate in efforts to coordinate Toyota's
25 inspection of the vehicle. Plaintiff shall make reasonable efforts to encourage the
26 vehicle owner to cooperate in making the vehicle available for inspection. Should the
27 vehicle owner refuse to informally make the vehicle available for inspection or
28 requires a subpoena, either party may issue a subpoena to initiate the inspection

1 process. If Toyota issues a subpoena, then within three (3) business days of receipt of
2 said service, plaintiff shall provide written notice to the owner advising that plaintiff
3 joins in the subpoena and has no objection.

4 No party may inspect the subject vehicle without providing reasonable advance
5 notice to the other party(s), not less than twenty (20) days. Each party is entitled to
6 attend and document the other's inspections. Such notice must also explicitly state
7 whether the inspection will involve any destructive inspection to testing or retrieval of
8 any electronic data from the on-board computer modules.

9 If a party objects to a proposed inspection, or the scope/protocol of the
10 inspection, the party must give notice of the intent to file a motion for protective order
11 at least five (5) days before the date noticed for the inspection, outlining the objections
12 and basis for the motion, and must file the motion within seven (7) days thereafter.

13 **3. Non-Accident Vehicles**

14 With respect to vehicles that allegedly experienced what is claimed to be an
15 unintended acceleration event, the owner/operator shall document the mileage when
16 such event or events occurred, or a best estimate, and notify counsel for Toyota so an
17 inspection of the vehicle can be scheduled as soon as practicable. The parties will
18 confer to agree on a protocol for any such inspection.

19 To the extent that the provisions of Sections A.1. and A.2. do not conflict with
20 the preservation obligations and inspection protocol set forth in this subsection, the
21 provisions above that pertain to Accident Vehicles (in or out of Plaintiff's possession)
22 are incorporated herein and apply to non-accident vehicles.

23 **4. Accident Vehicles Not-In-Suit**

24 Any counsel that represents a client with a case pending in the MDL is hereby
25 obligated to observe this Order's requirements regarding preservation of the subject
26 vehicle in any other matter counsel is involved in and anticipates including in this
27 MDL.
28

1 **B. Fact Sheets³**

2 **1. Purpose**

3 The Fact Sheets are intended to identify the issues in the specific cases and to
4 provide detailed information about the specific claims and defenses in each case in
5 order to assist the parties in efficiently litigating the cases and moving them forward.
6 To that end, all parties are obligated to provide as complete and straightforward
7 responses to the requests as information presently available allows.

8 The Fact Sheets are not meant to be a tool for obtaining general discovery
9 relevant to multiple cases or other “Core Discovery.” Instead, Fact Sheets are
10 intended to be a means for acquiring information and documents specific to each case.
11 Discovery relevant to multiple cases shall be dealt with via Master or Omnibus
12 Discovery Requests applicable to both personal injury/wrongful death cases and to
13 economic loss class actions.

14 **2. Timing of Fact Sheet Responses**

15 **a. *Plaintiffs’ Case-Specific Fact Sheet Responses***

16 For all personal injury/wrongful death cases currently in the MDL, Plaintiffs’
17 case-specific fact sheet responses shall be due thirty (30) days from the approval of
18 the Fact Sheet by the Court.

19 For future personal injury/wrongful death cases transferred to the MDL,
20 Plaintiffs’ case-specific fact sheet responses shall be due thirty (30) days from when
21 the Conditional Transfer Order is filed with the MDL Court or from when Toyota is
22 served with the summons and complaint, whichever is later.

23 Should any future personal injury/wrongful death cases be filed directly in the
24 MDL, Plaintiffs’ case-specific fact sheet responses shall be due thirty (30) days from
25 when Toyota is served with the summons and complaint, regardless of the status or
26 form of Toyota’s response or answer to the complaint.

27
28

³ Facts Sheets for the class action cases are discussed *infra* at Section V.C.2.b.

b. Toyota's Fact Sheet Responses

For personal injury/wrongful death cases currently in the MDL, Toyota's case specific fact sheet responses shall be due seventy-five (75) days from approval of the Fact Sheet by the Court.

For personal injury/wrongful death cases transferred to the MDL in the future or later filed directly in the MDL, Toyota's case-specific fact sheet responses shall be due forty-five (45) days after service of plaintiff's fact sheet responses.

3. Form of Fact Sheets

The form of the fact sheet shall be the subject of meet and confer between counsel.

As discussed *infra* in Section V.C.2.b., there shall be separate Fact Sheets for (1) individual personal injury/wrongful death cases and (2) economic loss class actions. While the information and form of Fact Sheets between these two categories are expected to be similar, the Facts Sheets will be tailored to the case type (i.e., personal injury or class economic loss).

4. Responses

Fact Sheet Responses must set forth all information known or reasonably ascertainable to the party and/or their counsel. The parties are obligated to make a reasonable search and diligent inquiry for information or documents responsive to the request.

Responses to documents requests must identify the documents being produced where the fact sheet requires the production of documents. If no documents are being produced in response to the particular question, the party must affirm that it has made a reasonable search and diligent inquiry and has been unable to locate the documents because they never existed, were destroyed, have been lost, misplaced, or stolen, or have never been, or are no longer, in the possession, custody, or control of the party. The statement shall set forth the name and address of any person or organization

1 known or believed by the party to have possession, custody, or control of that item or
2 category of item.

3 Responses to information requests shall be deemed interrogatory responses
4 pursuant to FRCP 33 and may be treated as such at time of trial. Responses to
5 document requests and the production of documents are deemed responses and
6 production under FRCP 34. All responses are enforceable under FRCP 37.

7 **5. Document Production Pursuant to Fact Sheets**

8 Documents produced in response to fact sheets shall comport with the following
9 requirements:

10 (1) Case-specific materials shall be produced to local counsel on the
11 particular case, copying without enclosures lead/liaison counsel.

12 (2) Document production shall be due thirty (30) days after service of fact
13 sheet responses, provided a Protective order has been entered, otherwise within ten
14 (10) days after the entry of a Protective Order.

15 (3) The production shall identify the request(s) the production is in response
16 to by labeling or an index.

17 (4) Plaintiffs' production shall include signed record release authorizations
18 as negotiated by the parties through a meet and confer process.

19 (5) The documents shall be produced in electronic format as agreed to by the
20 parties through a meet and confer process.

21 (6) The parties may establish their own document depositories but there will
22 not be one global document management system as that is not necessarily cost
23 effective or efficient and the parties likely have differing preferences based on
24 experience or the ways in which the documents will be utilized or shared.

25 (7) Bates labeling: the documents produced in response to fact sheets shall
26 follow the format set forth *infra* in Section VIII.B.1.

27 **6. Additional Case-Specific Discovery**

28 Each party may serve up to thirty (30) contention interrogatories separate and

1 distinct from the Fact Sheets. Contention interrogatories may not be served until sixty
2 (60) days before the close of discovery. Responses to contention interrogatories are
3 due within thirty (30) days of service. To the extent the party responding to the
4 contention interrogatories objects to them or withholds from the responses
5 information on the basis that it calls for premature expert discovery, that party is
6 required to automatically supplement the responses concurrent with expert disclosures
7 and production of expert reports.

8 **7. Dispute Resolution Concerning Fact Sheets**

9 Should either party determine that the other's Fact Sheet responses are
10 inadequate, the local counsel for the parties should engage in meet and confer, either
11 telephonically or in writing, and make best efforts to resolve the dispute without
12 intervention by lead/liaison counsel or the Court.

13 In the event that the dispute cannot be resolved through informal meet and
14 confer, the party claiming deficiencies must, prior to filing a motion to compel,
15 engage in the following process:

16 (1) Send a proposed motion to compel to local and lead/liaison counsel for
17 all parties. The motion should not exceed five (5) pages plus a separate statement of
18 the specific items in dispute.

19 (2) The responding party shall have five (5) business days to either send
20 correspondence detailing the responses to which they will provide supplemental
21 responses or production of documents and/or provide an opposition to the motion to
22 compel that does not exceed five (5) pages plus a response to the separate statement of
23 the specific items in dispute.

24 (3) If necessary, the moving party may then file with the Court the motion to
25 compel and separate statement, the opposition and separate statement, and a reply
26 brief not to exceed three (3) pages, along with a declaration attaching the underlying
27 Fact Sheet responses and any meet and confer correspondence. The Court will
28 thereafter notify the parties of a hearing date for the motion.

(4) The deadline for filing a motion to compel is sixty (60) days after service of the Fact Sheet responses or supplemental Fact Sheet responses, or if the motion pertains solely to the adequacy of a party's document production, then sixty (60) days after the production. The parties may agree, in writing, to extend the time for filing the motion to allow for further meet and confer.

C. Supplementation

The parties shall supplement prior Fact Sheet Responses consistent with Fed. R. Civ. P. 26(e).

D. Document Subpoenas

Document subpoenas for case-specific documents may be issued as of the date the Court approves this Discovery Plan.

The parties must notify each other of any subpoenas issued and the parties may join in each other's subpoenas.

Upon request in writing, a party will produce to the requesting party any documents received in response to a third-party subpoena. The requesting party shall be responsible for reasonable copying costs.

E. Depositions

Case-specific depositions shall comply with the procedure set forth below in Section VIII.C. The parties may take depositions as a necessary and appropriate means of fact gathering and assessment of the merits of their claims. It is expected that the parties will cooperate in the scheduling of such depositions.

The parties agree that the number of depositions in any given case will be limited by the facts and circumstances of the particular case and that some cases may require more or less depositions than others, depending on the number of parties, witnesses, and the type of claims at issue. If either party believes that the number of depositions being noticed in any particular case is unreasonable or unwarranted by the facts and circumstances of that case, the parties are to meet and confer as to the rationale for taking the depositions and whether the number of depositions can be

1 limited in that case. In the event that the dispute cannot be resolved through informal
2 meet and confer, the party that disagrees with the number of depositions being
3 noticed/taken must, prior to filing a motion for protective order, engage in the
4 following process:

5 (1) Send a proposed motion for protective order to local and lead/liaison
6 counsel for all parties. The motion should not exceed five (5) pages.

7 (2) The responding party shall have five (5) business days to respond or
8 provide an opposition to the motion that does not exceed five (5) pages.

9 (3) If necessary, the moving party may then file with the Court the motion to
10 protective order, the opposition, and a reply brief not to exceed three (3) pages, along
11 with a declaration attaching the underlying deposition notices and any meet and confer
12 correspondence. The Court will thereafter notify the parties of a hearing date for the
13 motion.

14 **F. Medical Examinations**

15 Toyota is entitled to non-invasive physical examination(s) of the plaintiffs by
16 healthcare professional(s) where the plaintiff has put his or her physical condition in
17 controversy, pursuant to FRCP 35. Plaintiff may object to the request by motion for
18 protective order.

19 Where plaintiff has made his or her mental condition an issue, in addition to or
20 instead of his or her physical condition, Toyota is permitted to request a mental
21 examination of the plaintiff. Plaintiff may object to the request by motion for
22 protective order.

23 A request for such physical or mental examination should be preceded by an
24 effort to schedule the examination on a day and at a time convenient to the plaintiff.
25 However, any such request must allow at least thirty (30) days' notice and must
26 comply with FRCP 35.

1 **V. CLASS DISCOVERY**

2 Plaintiffs' Co-Lead Counsel for Class Actions have not yet filed their
3 Consolidated Class Action Complaint. Therefore, at this stage of the proceeding, it is
4 unclear which claims and theories of defect will be asserted in the Consolidated
5 Complaint or what definition of putative classes and/or subclasses will be included in
6 the Consolidated Complaint. In particular, it is not clear whether Plaintiffs intend to
7 proceed solely on the theory of ETCS or whether the Consolidated Complaint will
8 also include claims based on damages allegedly caused by the Pedal and/or Floor Mat
9 Recalls. Because the scope of permissible discovery is derived from the claims and
10 defenses of the case, the Court believes that a detailed plan for class discovery should
11 be developed after the Consolidated Class Action Complaint is filed. Even at this
12 early stage of the litigation, however, there are certain principles that should guide the
13 Parties in the development of a more specific plan once the Consolidated Complaint
14 has been filed.

15 **A. Bifurcation Of Class And Merits Discovery**

16 An early decision of the class certification issue will substantially advance this
17 litigation. MCL at § 11.213 ("Class certification or its denial will have a substantial
18 impact on further proceedings, including the scope of discovery, the definition of
19 issues, the length and complexity of trial, and the opportunities for settlement.").
20 Bifurcating discovery such that discovery directed at supporting or defending class
21 certification is prioritized over general merits discovery will enable the parties to
22 brief the issue of class certification at an earlier stage of these proceedings, and, at the
23 same time, avoid wasting time and resources on merits-related discovery that may
24 eventually be unnecessary. Accordingly, except for the production of documents that
25 Toyota previously produced to NHTSA, the United States Congress, and the State
26 Attorneys General pursuant to Order No. 3, the targeted ETCS discovery discussed
27 below, case-specific discovery in the personal-injury/wrongful death cases,⁴ or as
28

⁴ As discussed above, case-specific discovery includes discovery that is not

otherwise set forth in this Discovery Plan or by agreement of the Parties, the Parties shall not engage in general merits discovery until the entry of the Court's decision on Plaintiffs' motion for class certification. However, limited merits discovery shall proceed concurrently with class discovery as explicitly set forth in this Discovery Plan and, the parties in the economic injury class actions can and shall participate so as to avoid duplicative discovery.

B. Identification Of Needed Discovery And Stipulated Facts

Because the scope of class discovery should be based on the claims and theories set forth in the pleadings, the class discovery period shall not commence until after the Consolidated Complaint is filed. During the class discovery period, counsel in the class action cases should expedite discovery needed to create an evidentiary record upon which Plaintiffs' class certification motion(s) can be briefed and decided. To this end, after the filing of the Consolidated Complaint and prior to commencing written discovery or depositions concerning class issues, the parties are directed to develop a plan which will identify the discovery needed for class certification.

Specifically, no later than August 16, 2010, Plaintiffs' Co-Lead Counsel for Class Actions shall submit to Defendants' Co-Lead Counsel for Class Actions a list of the discovery plaintiffs believe is needed in order to brief the issue of class certification ("Core Class Discovery") and a proposed schedule for class discovery and class certification briefing (the "Class Discovery Plan"). The parties shall meet and confer on the areas of discovery identified and the plan proposed, and no later than August 30, 2010, Defendants' Co-Lead Counsel for Class Actions shall submit to Plaintiffs revised proposals for Core Class Discovery and the Class Discovery Schedule and a list of proposed stipulations concerning facts relevant to class certification that Defendants are willing to provide in lieu of proceeding with formal discovery on such issues. Because motions to dismiss may narrow the scope of

duplicative of discovery likely to be sought in any other case, including other Personal Injury/Wrongful Death Cases or the Class Actions.

1 discovery relevant to class certification (for example, motions to dismiss may
2 determine whether a class of foreign plaintiffs is allowed to proceed), Defendants'
3 proposal should also identify areas of class discovery (if any) that Defendants believe
4 should be postponed until after Motions to Dismiss have been ruled upon. No later
5 than September 27, 2010, the parties shall submit to the Court a detailed schedule for
6 class discovery and class certification briefing, with alternative provisions for any
7 areas of disagreement.

8 The Court expects that Core Class Discovery may include the following:

- 9 • advertising materials
- 10 • organizational charts
- 11 • manuals, brochures, warranties, service histories, and sales documents
12 related to the class representatives' vehicles
- 13 • identification of vehicles equipped with ETCS
- 14 • class representatives' fact sheets and related documents

15 It is anticipated that the Parties will be able to identify and agree upon additional areas
16 of Core Class Discovery after the Consolidated Complaint has been filed.

17 **C. Specific Issues Concerning Class Discovery**

18 **1. Timing and Progression of Class Discovery**

19 The Class Discovery Plan submitted by the parties shall contemplate an orderly
20 progression of discovery that will avoid duplication and unnecessary discovery. In
21 particular, it is expected that, to the extent possible, all written and document
22 discovery directed to class specific issues shall be completed prior to the taking of
23 depositions necessary for the briefing of class certification. Similarly, all fact
24 discovery related to class certification shall precede all expert discovery related to
25 class certification issues.

26 As explained above, the class discovery period shall not commence until after
27 the filing of the Consolidated Class Action Complaint. Moreover, written discovery
28 requests shall not be served until after the submission of the Class Discovery Plan to

1 the Court as set forth above.

2 The Class Discovery Plan shall address the need for any deviations from the
3 discovery procedures set forth in the Federal Rules of Civil Procedure or in this
4 Discovery Plan, including whether additional time will be permitted to respond to
5 written discovery requests, the number of interrogatories that will be permitted,
6 whether additional time will be needed for depositions, and whether there should be
7 any limitations on the number of depositions permitted.

8 **2. Discovery of Class Representatives**

9 **a. *Vehicle Inspections of Class Representatives***

10 It is expected that the Class Discovery Plan will include a proposal for the
11 timing of inspections of class representatives' vehicles. The protocol for such
12 proposals shall be substantially similar to the procedure set forth above in Section
13 IV.A. for the personal injury/wrongful death cases.

14 **b. *Class Representative Fact Sheets***

15 The Court anticipates that the class representatives will submit fact sheets
16 similar to the fact sheets to be submitted in the personal injury/wrongful death cases
17 discussed above in Section IV.B. While there may be some differences in the content
18 and timing of the Class Fact Sheets as compared to the Individual Plaintiff Fact
19 Sheets, it is expected that the procedures set forth above concerning the fact sheets
20 shall also be applied in the class actions.

21 Among other items to be addressed by the Class Fact Sheets, Defendants have
22 indicated that the following categories of information and documents will be sought:

- 23 • For Consumer Class Representatives:
- 24 ○ Documents and information concerning the transactional history of
 - 25 vehicles belonging to class representatives
 - 26 ○ Documents and information concerning general background
 - 27 information regarding class representatives
 - 28

- Documents and information concerning the condition and maintenance of Toyota vehicles belonging to class representatives
- Documents and information concerning the response(s) to Toyota recall(s) involving vehicles belonging to class representatives
- Documents and information concerning any attempt to sell, transfer, trade, or otherwise dispose of the Toyota vehicles belonging to class representatives
- Documents and information concerning alleged unintended acceleration events
- Documents and information concerning alleged economic damages
- Documents and information concerning plaintiffs' lease and/or finance contracts with Toyota Motor Credit Corporation ("TMCC"), if applicable
- For Non-Consumer Class Representatives:
 - Documents and information concerning the sale and purchase history and practices of any dealer plaintiffs
 - Documents and information concerning the rental history and practices of any rental car company plaintiff
 - Documents and information reflecting the alleged lost profits of any dealer or rental car company plaintiff

It is anticipated that the Parties will meet and confer to agree upon the information and documents to be obtained via class representative fact sheets.

c. *Additional Discovery of Class Representatives*

It is anticipated that the use of Class Representative Fact Sheets will obviate the need for extensive written discovery of class representatives. However, it is expected that additional written discovery will be needed after responses to class representative facts sheets have been provided. The Class Discovery Plan shall address the any limitations on additional written discovery requests to the class representatives beyond

1 the fact sheets discussed above.

2 It is also anticipated that depositions of class representatives will be necessary.
3 Unless otherwise addressed in the Class Discovery Plan, depositions of class
4 representatives shall comply with the procedures set forth in Section VIII.C. below.

5 **3. Discovery of Defendants**

6 **a. Master Class Discovery Requests**

7 It is expected that Plaintiffs will propound a single set of Master or Omnibus
8 Class Discovery Requests applicable to all defendants to the class action cases. The
9 Class Discovery Plan will set forth the deadlines for responding to such requests and
10 limitations concerning the number of interrogatories propounded. In particular, it is
11 anticipated that, given the scope of these requests, it may be appropriate to extend the
12 time permitted to respond to written requests and/or to increase the number of
13 interrogatories permitted.

14 **b. Depositions**

15 It is expected that Plaintiffs will postpone corporate depositions until
16 documents have been produced to avoid the necessity of further depositions based on
17 document production and review.

18 Except as otherwise provided in the Class Discovery Plan, depositions of class
19 representatives shall comply with the procedures set forth in Section VIII.C. below.

20 **D. Communications With Putative Class Members**

21 **1. Purpose**

22 The administration of justice often requires that limited restrictions be placed on
23 counsel and parties in cases in which class certification is sought or has been granted.
24 In class actions where a putative class member is permitted to elect not to participate
25 in the class action, there is an inherent risk that a class member's decision may, in the
26 absence of court regulation of communications regarding the class action, not be
27 based on a complete and balanced presentation of the relevant facts. Special
28 management of class actions is often necessary to protect the interests of both formal

1 parties and absent class members.

2 **2. Restrictions on Communications**

3 All parties and counsel are forbidden from soliciting fees and expenses or
4 agreements to pay fees and expenses from prospective or actual class members who
5 are not formal parties or who do not plan to become formal parties or from soliciting
6 individuals to serve or not serve as class representatives or otherwise participate in the
7 litigation.

8 All parties and counsel are forbidden to communicate with prospective or actual
9 class members with the purpose of intentionally misleading, harassing, or threatening
10 prospective or actual class members. Nothing herein is intended to prevent the Toyota
11 defendants from acting in the normal course of their continuing business operations.

12 The obligations and prohibitions set forth above are not exclusive. All other
13 ethical, legal, and equitable obligations to which counsel and/or parties are subject are
14 not affected by this subsection.

15 **3. Additional Restrictions on Communications**

16 The Parties are required to meet and confer to determine whether proper
17 management of the case or the interests of putative class members require the entry of
18 an order further limiting communications with putative class members. The
19 conference shall occur as soon as practicable, but in no event later than twenty-one
20 (21) days after the Consolidated Complaint is served. Within fourteen (14) days after
21 the conference, counsel shall submit a joint statement of their collective or individual
22 views as to whether an order should be entered limiting communications. If counsel
23 agree no order is necessary, they shall so state in their report to the Court. If counsel
24 agree that an order limiting communications should be entered, they shall submit the
25 proposed content of such order and the grounds justifying entry of same. If counsel
26 cannot agree whether an order should be entered or what the content of such an order
27 should be, they shall report this to the Court and either submit stipulated facts for the
28 Court's consideration or request a hearing to present evidence on the issue. Based on

1 the record before the Court, an order limiting communications may be entered upon a
2 finding that a failure to so limit communications would likely result in imminent and
3 irreparable injury to one of the parties. Neither the parties nor their counsel shall
4 initiate communications with putative class members regarding the substance of the
5 lawsuit until counsel presents the required report to the Court and any necessary order
6 is entered pursuant to the report.

7 **4. Discovery From Putative Class Members**

8 The Toyota Defendants specifically reserve the right to seek discovery from
9 putative class member pre-certification. The Class Discovery Plan, see Part V, *supra*,
10 shall address whether discovery of absent class members is necessary in this litigation
11 and a specific plan concerning the discovery to be had.

12 **VI. ETCS DISCOVERY**

13 Although it is unclear whether Plaintiffs in the Class Actions will continue to
14 pursue claims based on the Floor Mat and Pedal Recalls, it is evident that they do
15 intend to proceed with claims related to an alleged defect in Toyota's ETCS.
16 Discovery related to ETCS will also be relevant to some of the personal
17 injury/wrongful death cases. Accordingly, the Court believes it is appropriate to move
18 forward with targeted discovery pertaining to ETCS prior to the Court ruling on
19 motions to dismiss or class certification.

20 **A. Targeted ETCS Discovery**

21 This litigation involves the ETCS of numerous Toyota and Lexus models
22 spanning more than a decade of model years. At this stage in the litigation, the Court
23 concludes that, rather than commencing with open-ended ETCS discovery covering
24 numerous models and model years, it would be preferable to proceed with a more
25 targeted approach. *See* MCL § 11.422 ("Targeted discovery may be nonexhaustive,
26 conducted to produce critical information rapidly on one or more specific issues.").
27 The Court determines that ETCS discovery should initially be limited to the following
28 three areas:

- 1 • Documents Produced to NHTSA in RQ10-003 subject to production
2 pursuant to the June 1 Order: Toyota shall produce relevant, non-
3 privileged documents from this RQ production, subject to objections.
- 4 • ETCS discovery produced in other cases: The Parties have indicated that
5 documents relevant to ETCS have been produced in other individual
6 products liability cases that are not a part of this MDL proceeding. The
7 Parties are directed to meet and confer to identify and agree upon other
8 cases likely to have relevant ETCS discovery and a timeline for
9 producing such documents.
- 10 • ETCS Documents Pertaining to 2002-2006 Camry: The Court believes
11 that it would be wise to initially limit ETCS discovery to certain
12 exemplar vehicles. The scope of such documents and the timing of such
13 document requests shall be subject to the meet and confer process
14 addressed below in subsection B for developing a targeted ETCS
15 discovery plan.

16 Toyota's plan proposes that targeted ETCS discovery *begin, not end* with the 2002-
17 2006 Camry. It is Toyota's position that ETCS discovery be sequenced to focus first
18 on the Camry before extending to other vehicle models. Although additional ETCS
19 discovery will likely be necessary, it is the Court's intent that this initial targeted
20 discovery will allow the Parties to proceed with ETCS in a more focused manner.

21 **B. Development Of A Targeted ETCS Discovery Plan**

22 It is expected that the documents being produced pursuant to Order No 3, the
23 documents identified above (i.e., ETCS documents produced pursuant to NHTSA's
24 RQ and ETCS documents produced in other cases), and the limited Rule 30(b)(6)
25 depositions discussed *supra* in Section III., will assist the parties in determining the
26 proper scope of a targeted ETCS Discovery Plan focused on an exemplar vehicle or
27 vehicles. Accordingly, a detailed ETCS discovery plan and *Daubert* briefing plan
28 shall be postponed until after these materials have been produced and reviewed.

1 Based on a review of the ETCS documents described above, the Parties shall
2 meet and confer to determine (1) the scope of discovery necessary to expedite
3 *Daubert* motions related to the issue of ETCS in the exemplar vehicles and (2) a
4 proposed timeline for exemplar ETCS discovery and ETCS *Daubert* briefing. The
5 Parties shall then submit a Joint Report setting forth the proposed scope of targeted
6 ETCS discovery and a proposed schedule for such discovery and ETCS *Daubert*
7 briefing. Should the parties be unable to reach agreement on any of these issues, the
8 Parties' Report shall contain a sections setting forth the views of each respective
9 position.

10 It is anticipated that the ETCS Discovery Plan will utilize a single set of Master
11 or Omnibus ETCS Discovery Requests that will be propounded on each Defendant. It
12 is also expected that, with the exception of the limited 30(b)(6) Depositions discussed
13 above, written discovery will proceed prior to depositions and that fact discovery will
14 be conducted prior to commencing expert discovery.

15 **VII. FURTHER REFINEMENT OF ISSUES**

16 Pursuant to Order No. 3, documents previously produced to certain government
17 entities will be produced by Toyota in this MDL commencing on July 2, 2010 and
18 continuing on a rolling basis thereafter. It is anticipated that this production will assist
19 the Plaintiffs in defining and narrowing the issues and claims in this litigation. *See*
20 MCL § 11.491 ("Access to such materials can reduce the need for discovery and assist
21 in defining and narrowing issues."). Although it is expected the production of these
22 documents will assist Plaintiffs in drafting their Consolidated Class Action Complaint,
23 the Court is mindful that this will be a large production of documents and that further
24 review of these documents after the filing of the Consolidated Complaint may assist
25 plaintiffs in further refining their claims and theories. Accordingly, by August 23,
26 2010, Plaintiffs are directed to file with the Court a statement further specifying the
27 theory(ies) of defect that plaintiffs plan to pursue in this litigation and the basis
28 therefore, and indicating whether, based on information learned from these

1 documents, Plaintiffs are willing to voluntarily dismiss any of their pending claims.
2 This statement is designed primarily to assist the Parties in refining the issues in this
3 litigation and the proper scope of discovery, and for this reason, the statement will not
4 be binding, will not waive claims or defenses, and may not be offered into evidence
5 against a party in later proceedings. However, should Plaintiffs identify any claims
6 that they wish to dismiss voluntarily, a proposed stipulation of dismissal shall be filed
7 on August 23, 2010 so that Defendants can avoid filing any unnecessary motions to
8 dismiss.

9 **VIII. GENERAL PROVISIONS GOVERNING DISCOVERY**

10 **A. Service**

11 **1. Written Discovery Requests And Responses**

12 **a. *Electronically Filed Documents***

13 Pursuant to Fed. R. Civ. P. 5(d) and Local rule 26-2, discovery requests and
14 responses will not be filed with the Court, except when specifically ordered by the
15 Court or to the extent they are necessary in connection with a motion. Parties shall,
16 however, electronically file through CM/ECF (which will be electronically served on
17 all counsel of record) a certificate of service identifying the discovery served.
18 Plaintiffs' Co-Lead Counsel for Class Actions and for Personal Injury/Wrongful
19 Death Cases and Defendants' Co-Lead Counsel for Class Actions and for Personal
20 Injury/Wrongful Death Cases shall distribute such filings as appropriate to other
21 counsel and parties on their respective sides of this proceeding who have not signed
22 up for notification of electronic filings.

23 **b. *Non-Electronically Filed Documents***

24 Any discovery (with the exception of document productions), correspondence,
25 or other document that is not filed electronically through CM/ECF shall be served
26 through Lexis File and Serve, which will send notice of the filing and service of the
27 document via electronic means to all parties on the Lexis File and Serve service list.
28

1 **2. Document Productions**

2 Defendants shall serve one copy of any documents or data produced pursuant to
3 discovery requests or Court order by overnight delivery, by electronic mail, by
4 facsimile, or by hand, as appropriately expeditious given the format and quantity of
5 documents or data produced, on Plaintiffs' Co-Lead Counsel for Class Actions and on
6 Plaintiffs' Co-Lead Counsel for Personal Injury/Wrongful Death Cases. Plaintiffs'
7 Co-Lead Counsel shall distribute such document or data production to other Plaintiffs'
8 counsel and plaintiffs in this proceeding, as appropriate and in accordance with any
9 Protective Orders or agreements entered into by the Parties. Pursuant to Fed. R. Civ.
10 P. 5, service on Plaintiffs' Co-Lead Counsel shall constitute service on all Plaintiffs.
11 If any document or data production pertains only to a particular case or cases,
12 Defendants shall only serve the item by overnight delivery, by electronic mail, by
13 facsimile, or by hand, as appropriately expeditious given the format and quantity of
14 documents or data produced, on the Plaintiffs' counsel who have entered an
15 appearance in the particular case or cases.

16 Plaintiffs shall serve one copy of any documents or data produced pursuant to
17 discovery requests or Court order by overnight delivery, by electronic mail, by
18 facsimile, or by hand, as appropriately expeditious given the format and quantity of
19 documents or data produced, on Defendants' Co-Lead Counsel for Class Actions and
20 on Defendants' Co-Lead Counsel for Personal Injury/Wrongful Death Cases.
21 Pursuant to Fed. R. Civ. P. 5, service on Defendants' Co-Lead Counsel shall
22 constitute service on all Defendants.

23 Case-specific materials in the personal injury/wrongful death cases shall be
24 produced to local counsel on the particular case, copying without enclosures
25 lead/liaison counsel.

26 **B. DOCUMENT PRODUCTIONS**

27 **1. Document Identification**

28 Each producing party shall give each page of any document it produces a

1 unique number, using a consistent numbering system that identifies the producing
2 party (using a letter or series of letters as a prefix).

3 In the event that documents produced by persons or entities who are not parties
4 to this action are not, when produced, identified by a unique numbering system, the
5 party at whose request production was made shall be responsible for numbering the
6 documents in accordance with the terms of the paragraph above.

7 **2. Creation of Document Repositories**

8 The Parties believe that a global document management system would not
9 necessarily be cost effective or efficient given that the parties will likely have
10 differing preferences concerning the manner that documents will be utilized or shared.
11 Instead, lead Counsel for each side may establish a document depository for purposes
12 it deems appropriate and necessary to accomplish their obligations to their respective
13 constituencies in this MDL. Security and access to such repositories shall be
14 consistent with all confidentiality and protective orders entered in this litigation. Each
15 side shall administer and bear the costs of its own depository.

16 **3. Privileged Information**

17 **a. *Inadvertent Disclosure***

18 If a party inadvertently produces documents or information subject to a claim of
19 privilege or work product protection, that production will not waive otherwise
20 applicable claims of privilege or work product protection to the extent provided for
21 under Federal Rule of Evidence 502(b). Upon discovery by the receiving party, or
22 receipt of written notice from the producing party identifying privileged or protected
23 documents that were inadvertently produced, whichever first occurs, the receiving
24 party shall within seven (7) days: either (a) return the subject documents and all
25 copies, and destroy any portions of any work product containing or reflecting the
26 contents of the subject materials; or (b) after attempting to resolve any dispute with
27 opposing counsel informally, file a motion challenging the assertion of privilege and
28 tender the subject documents for in camera review with the motion. The receiving

1 party shall do nothing to compromise the privilege claim until the issue is resolved.

2 **b. *Privilege Log***

3 Subject to the exceptions below, any documents withheld from production or
4 redacted in part on the grounds of attorney-client privilege, the work product doctrine
5 or any other privilege or protection from disclosure, shall be listed on a privilege log
6 providing sufficient information to allow the receiving party to determine the basis of
7 the privilege asserted, including identification of the document, the date, author(s),
8 recipient(s), a brief description of the document (e.g., correspondence, memo, etc.),
9 and the basis for withholding the document (e.g., attorney-client privilege, attorney
10 work product, etc.). The following categories of documents protected from disclosure
11 on grounds of privilege or work product need not be included on any such privilege
12 log: (i) communications between a party and its outside counsel; (ii) outside counsel
13 communications; (iii) outside counsel and in-house counsel work product and
14 materials generated by or for counsel, including communications with and materials
15 prepared by consulting experts; and (iv) communications of common interest among
16 Plaintiffs' counsel or among Defendants' counsel.

17 **4. *Production of Foreign Language Documents***

18 This litigation is likely to involve a substantial number of Japanese language
19 documents. With the exception of translated documents produced to Government
20 entities and which are to be produced by Toyota pursuant to Order No. 3, unless
21 translated versions of documents are kept in ordinary course of business, Defendants
22 are under no obligation to produce translated copies of Japanese documents.

23 The Parties recognize that disputes as to translations may develop during the
24 course of this litigation. The Parties shall meet and confer concerning a proposal for
25 resolving such disputes with respect to documents that are to be used at depositions or
26 that any party seeks to introduce or rely upon in any submission or court proceeding
27 related to a summary judgment or other dispositive motion, or at trial in this MDL.
28

1 **5. Format of Produced Documents**

2 The Parties are currently engaged in a meet and confer process concerning the
3 format of documents to be produced in discovery in this litigation, including but not
4 limited to "Load File Specifications" for document productions. Should the parties be
5 unable to reach agreement on this issue, they shall submit a joint proposal containing
6 alternative provisions where there is disagreement.

7 **C. Depositions**

8 **1. Avoidance of Duplicative Depositions**

9 The Parties expect that fact witness depositions in this matter will commence in
10 due course. (Except as otherwise provided in this Discovery Plan, all expert witness
11 depositions will be deferred until further order of this Court.) The Parties' objective is
12 to avoid the repeated depositions of any person. Accordingly, except by agreement of
13 the parties, as provided herein, or for good cause shown, no witness subject to these
14 protocols shall be deposed more than once on the same subject matter. This restriction
15 does not apply to persons rendering case-specific expert opinions.

16 Representatives of the Plaintiffs' Lead Counsel (and/or their designated
17 representatives) and the Defendants' Lead Counsel (and/or their designated
18 representatives) therefore shall attempt to establish by mutual agreement a schedule
19 for depositions in this proceeding that reflects a sequencing that is consistent with (a)
20 the availability of documents from among those produced by the parties and third
21 parties; (b) the objective of avoiding the need to subject any person to repeated
22 depositions; and (c) the need to preserve relevant testimony. Disputes concerning the
23 timing and scheduling of depositions may be presented to the Court of Special Master
24 in accordance with Local Rule 37 and this Discovery Plan.

25 **2. Deposition Notices and Scheduling**

26 The Parties are expected to notice and take only those depositions needed to
27 prepare their case. The parties are further expected to cooperate in the scheduling of
28 depositions.

1 Discovery shall be staged in a manner appropriate to present specific issues to
2 the Court. For example, depositions of any named Plaintiffs in the Consolidated Class
3 Action Complaint shall be taken within a reasonable time before Defendants' briefing
4 on class certification is due to be submitted in accordance with the class certification
5 schedule to be established by the Parties and the Court.

6 Depositions of individual plaintiffs and other case-specific fact witnesses in the
7 Personal Injury/Wrongful Death Cases may be taken in this proceeding at any time
8 consistent with the foregoing principles of cooperation and planning. Counsel for the
9 parties are to meet and confer as to the sequencing and scheduling of case-specific fact
10 discovery.

11 The parties shall endeavor to schedule all depositions at locations within a
12 reasonable distance from the residence of the deponent.

13 Absent compelling circumstances, at least forty-five (45) days notice must be
14 given for any non-party witness deposition. Absent compelling circumstances, at least
15 thirty (30) days notice must be given for any plaintiff deposition. Absent compelling
16 circumstances, at least forty-five (45) days notice must be given for any deposition of
17 a domestic corporate defendant, whether taken pursuant to FRCP 30(b)(6) or as the
18 deposition of a named employee. Absent compelling circumstances, at least ninety
19 (90) days notice must be given for any deposition of a foreign corporate defendant,
20 whether taken pursuant to FRCP 30(b)(6) or as the deposition of a named employee.

21 Plaintiffs' Lead Counsel will be responsible for keeping the counsel that they
22 represent fully apprised of the scheduling of any depositions in this proceeding.

23 **3. Specific Restrictions Concerning Depositions of Defendants**

24 **a. *Necessity of Depositions***

25 Plaintiffs shall in good faith take only those depositions deemed reasonably
26 necessary under the circumstances of this case.

27 **b. *Number of Depositions***

28 As to each named defendant, the parties shall meet and confer to determine the

1 appropriate limits on the number of individuals, including former employees, that
2 Plaintiffs shall be permitted to depose. Upon request by plaintiffs, a defendant shall
3 take reasonable steps to make available for deposition requested former employees.
4 Plaintiffs shall not contact former employees of defendants without the permission of
5 the former employer defendant.

6 The Parties shall also meet and confer to determine the proper number of Rule
7 30(b)(6) depositions that will be permitted. However, the particular matters identified
8 in a Rule 30(b)(6) notice shall not duplicate any matters identified in connection with
9 a prior Rule 30(b)(6) deposition notice of that defendant.

10 **c. *Avoiding Multiple Depositions***

11 Plaintiffs are encouraged to await corporate depositions until documents have
12 been produced to avoid the necessity of further depositions based on document
13 production and review. Except by agreement of parties or for good cause shown, no
14 corporate employee or representative subject to these protocols shall be deposed more
15 than once on the same subject matter.

16 **d. *Use of Depositions at Trial***

17 Any corporate employee or 30(b)(6) witness that is deposed in this MDL may
18 not be subpoenaed for attendance and testimony at trial as the deposition will be
19 conducted pursuant to FRCP 32(a)(3) permitting use of the deposition at a hearing or
20 trial. Toyota may elect to produce the witness at trial voluntarily.

21 **4. Attendance**

22 While a deponent is being examined about any document designated
23 confidential pursuant to a confidentiality agreement or order or the confidential
24 information contained therein, persons to whom disclosure is not authorized under the
25 confidentiality order shall be excluded.

26 Unnecessary attendance by counsel is discouraged, and the Court may not
27 compensate such attendance in any fee application to the Court.
28

1 **5. Conduct of Depositions**

2 In any deposition, no more than two attorneys for the Plaintiffs and no more
3 than two attorneys for Defendants may question the deponent. The Plaintiffs'
4 questioners for each deposition shall be designated by Lead Counsel. In the case of
5 any deposition noticed by a Defendant, the questioner(s) shall be selected jointly by
6 Defendants' counsel. Questioners shall divide their time by agreement, asking the
7 Court to resolve any disputes in that regard (but only where absolutely necessary).

8 Reasonably in advance of the date scheduled for a deposition, any attorney
9 designated as a questioner for that deposition shall coordinate with the other counsel
10 whose interests they represent regarding the areas of examination and specific
11 questions to be asked. The purpose of this coordination is to ensure that a thorough
12 deposition is conducted. Counsel who will not be serving as questioners are
13 encouraged to submit proposed questions or lines of questioning to the attorney
14 designated to conduct the deposition on their behalf. Attorneys will be responsible for
15 tracking the dates of depositions and suggesting their proposed lines of questioning on
16 a timely basis. New or supplemental depositions of witnesses will not be scheduled
17 without prior leave of Court.

18 In some depositions, there may be sufficient divergence of positions among
19 various parties that additional examiners may be appropriate on *non-redundant* (i.e.,
20 new subject) matters. In those instances, with leave of Court in advance of the
21 deposition and upon good cause shown, additional attorneys will be permitted to
22 question the deponent on non-redundant matters.

23 All objections are preserved except as to form of the question and
24 responsiveness of the answer. Counsel shall otherwise comply with Fed. R. Civ. P.
25 30(d)(1) and Rule 30.1 of the Local Rules of this Court concerning the posing of
26 objections during a deposition.

27 **6. Furnishing Documents in Advance of Fact Witness Depositions**

28 Deposing counsel, shall, ten (10) days prior to the deposition, furnish

1 deponent's counsel with a copy of all of the documents he or she, in good faith,
2 expects to question the deponent about during the deposition. Where the deponent is
3 an employee of a defendant, the deposing counsel may furnish the deponent's counsel
4 with a list designating the Bates numbers of all the documents he or she expects to
5 question the deponent about during the deposition in lieu of furnishing deponent's
6 counsel with the actual documents. Deponent's counsel may prepare the deponent for
7 the deposition in keeping with all professional and ethical rules of practice (i.e.,
8 deponent shall answer all questions fully and truthfully). In addition to providing
9 documents to the deponent's counsel ten days prior to the deposition (or furnishing the
10 deponent's counsel with a list of Bates numbers of documents) pursuant to this
11 paragraph, extra copies of documents about which counsel expect to examine the
12 deponent should ordinarily be provided to the deponent at the deposition.

13 Pursuant to Rule (30)(c), deposing counsel may notify deponent's counsel that
14 he or she is withholding particular documents about which the deponent will be
15 questioned if such documents may be withheld under F.R.E 613(a).

16 The foregoing provisions shall not apply to expert depositions.

17 **7. Duration of Examinations**

18 Consistent with Fed. R. Civ. Pro. 30(d)(1), depositions shall generally be
19 limited to seven (7) total hours, excluding time taken for breaks, meals, and other
20 reasons, not extend beyond one (1) day except by agreement of the Parties or with
21 leave of Court. However, the Parties recognize the need for flexibility in determining
22 the duration of examinations and shall meet and confer in good faith to attempt to
23 resolve any disputes over appropriate exceptions to this durational limitation. Should
24 the Parties be unable to reach agreement, deviation from these time limitations will be
25 permitted only with leave of Court. Any request to extend the time limit on a
26 deposition must be accompanied by a certification that compelling reasons preclude
27 completion of the deposition during the allotted time period and that the particular
28 information being sought cannot be elicited from a witness that is (or could be)

1 scheduled to appear at another time.

2 It is expected that counsel will confer prior to each deposition to determine how
3 time will be allotted to each participating attorney, consistent with the provisions set
4 forth above. This conference should occur a sufficient time prior to the deposition to
5 permit the resolution of any disputes regarding time allocation by the Court, should
6 that become necessary.

7 **8. Supplemental Depositions**

8 Witnesses shall not be subjected to more than one deposition conducted within
9 the limitations described above, nor to repetitive and redundant questioning.
10 Supplemental depositions will be permitted only upon motion demonstrating (a) a
11 compelling need for the information sought and (b) compelling reasons why the
12 desired lines of questioning could not have been pursued in the original deposition and
13 why the information cannot be obtained from any persons available for future
14 depositions. If permitted, a supplemental deposition shall be treated as the resumption
15 of the deposition originally noticed. Examination in any supplemental deposition shall
16 not be repetitive of any prior interrogation.

17 Any person or entity who was not a party to the MDL when a corporate
18 employee or representative deposition was taken may, within sixty (60) days of
19 becoming a party and after coordination with Co-Lead Counsel for the appropriate
20 group, request permission of counsel for the deponent, and the Court if necessary, to
21 conduct a supplemental deposition of the corporate employee or representative. If
22 permitted or ordered, the supplemental deposition shall be treated as the resumption of
23 the deposition originally noticed and shall not include examination on topics
24 addressed in prior portions of the deposition or otherwise repetitive of prior
25 interrogation.

26 **9. Stenographic Recording**

27 A certified court reporter shall stenographically record all deposition
28 proceedings and testimony. The court reporter shall administer the oath or affirmation

1 to the deponent. A written transcript by the court reporter shall constitute the official
2 record of the deposition for purposes of Fed. R. Civ. P. 30(e) (submission to the
3 witness) and 30(f) (filing, exhibits).

4 **10. Videotaping**

5 A party may record a deposition by videotape pursuant to Fed. R. Civ. P.
6 30(b)(2) and (3). The following rules shall apply to the taking of any such deposition:

7 Simultaneous Stenographic Recording: All videotaped depositions shall be
8 simultaneously stenographically recorded.

9 Cost of the Deposition: The party requesting videotaping of the deposition
10 shall bear the expense of the videotaping. However, all parties will bear their own
11 expense of obtaining copies of the videotaped deposition.

12 Videotape Operator: The operator(s) of the videotape recording equipment
13 shall be subject to the provisions of Fed. R. Civ. P. 28(c). At the commencement of
14 the deposition, the operator(s) shall swear or affirm to record the proceedings fairly
15 and accurately.

16 Interruptions: No attorney shall direct instructions to the video operator as to
17 the method of operating the equipment. The video camera operation will be suspended
18 during the deposition only upon stipulation by counsel and during "off the record"
19 discussions. The video operator shall record on camera the time of suspension and any
20 subsequent reconvening of the deposition.

21 Standards: The deposition will be conducted in a manner to replicate, to the
22 extent feasible, the presentation of evidence at trial. Unless physically incapacitated,
23 the deponent shall be seated at a table except when reviewing or presenting
24 demonstrative materials for which a change in position is needed. To the extent
25 practicable, the deposition will be conducted in a neutral setting, against a solid
26 background, with only such lighting as is required for accurate video recording.
27 Lighting, camera angle, lens setting, and field of view will be changed only as
28 necessary to record accurately the natural body movements of the deponent or to

1 portray exhibits and materials used during the deposition. Sound levels will be altered
2 only as necessary to record satisfactorily the voices of counsel and the deponent.

3 Certification: After the deposition is completed, the video operator shall certify
4 on camera the correctness, completeness, and accuracy of the video tape recording in
5 the same manner as a stenographic court reporter. No part of a videotaped deposition
6 shall be released or made available to any member of the public unless authorized by
7 the Court.

8 Use: Depositions may, under the conditions prescribed in Fed. R. Civ. P.
9 32(a)(1)-(4) or as otherwise permitted by the Federal Rules of Evidence, be used
10 against any party (including parties later added and parties in cases subsequently filed
11 in, removed to, or transferred to this Court as part of this litigation): (1) who was
12 present or represented at the deposition; (2) who had reasonable notice thereof; or (3)
13 who, within thirty (30) days after the taking of the deposition (or, if later, within sixty
14 (60) days after becoming a party in this court in any action that is a part of this
15 litigation), fails to show just cause why such deposition should not be usable against
16 such party.

17 **11. Deposition Disputes**

18 During depositions, disputes that arise that cannot be resolved by agreement
19 and that, if not immediately resolved, will significantly disrupt the discovery schedule
20 or require a rescheduling of the deposition, may be presented to the Court or Special
21 Master by telephone. The presentation of the issue and the Court's ruling will be
22 recorded as part of the deposition. The Court will exercise by telephone the authority
23 granted under 28 U.S.C. § 1407(b) to act as district judge in the district in which the
24 deposition is taken.

25 **D. Discovery Dispute Resolution**

26 To avoid unnecessary litigation concerning discovery disputes, counsel are
27 directed to meet and confer before filing any motion on discovery issues. In any
28 motion filed, counsel for the moving party must comply with Rule 37.1 of the Local

Rules of this Court.

IX. MODIFICATION

Modification of this Order may be necessary based on experience operating under it and the parties and claims ultimately included in the Master Consolidated Complaint. Any party is therefore free to seek modification of this Discovery Plan for good cause shown.

Dated: June 21, 2010

Respectfully submitted,

By: /s/ Lisa Gilford

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